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NO. 90-1985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALBANY INSURANCE COMPANY,
Petitioner

Versus

ANH THI KIEU,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF CONSENT OF ALL PARTIES

The Maritime Law Association of the United States certifies that all counsel-of-record have stated in writing that they consent to The Maritime Law Association of the United States' submission of a Brief *Amicus Curiae* in support of Albany Insurance Company's Petition for Writ of Certiorari. Copies of the written consents have been filed with the Clerk.

STATEMENT OF INTEREST

The Maritime Law Association of the United States has a very strong interest in the disposition of this case. The MLA is a nationwide bar association founded in 1899. It has a membership of about 3,600 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

The MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, passengers, marine insurance underwriters, and other maritime claimants and defendants.

The purposes of the MLA are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, *to promote uniformity in its enactment and interpretation,* to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comite Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations. (Emphasis added.)

In furtherance of these objectives, the MLA, during the ninety-one years of its existence, has sponsored a wide range of legislation dealing with maritime matters

including the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act.[2] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

The MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commission on Trade Law ("UNICITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

The MLA has actively participated as one of some forty-nine national maritime law associations constituting the Comite Maritime International,[4] in the movement to

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1. 46 U.S.C. §§ 1300-1315.

2. 9 U.S.C. §§ 1-15.

3. E.G., 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; Implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 M.M. *COHEN*, BENEDICT ON ADMIRALTY, Doc. No. 3-4 at 3.35 to 3-78.2 (7th rev'd ed. 1990) (hereinafter "BENEDICT"), *see* 33 C.F.R. ch. 1, subch. D., Special Note at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

4. These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, German Democratic Republic, Greece, Hong Kong, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Senegal, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

achieve maximum international uniformity in maritime law through the medium of international conventions.[5]

The MLA believes that uniformity in maritime law, both national and international, is of great importance. This concern has been repeatedly expressed by our membership and standing committees. For example, in 1975, the MLA Standing Committee on Uniformity of United States Maritime Law recommended that steps be taken to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975. A substantially identical resolution was adopted by the American Bar Association in 1976.[6] This policy has since been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[7]

In furtherance of its uniformity policy and resolutions, the MLA has filed *amicus* briefs in a number of cases

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5. E.G., Assistance and Salvage 1910), 37 Stat. 1658 (1913), *reprinted in* 6 BENEDICT, Doc. No. 4-1 at 4-2 to 4-10; Ocean Bills of Lading (The Hague Rules) (1924), 120 L.N.T.S. 155, *reprinted in* 6 BENEDICT, Doc. ..o. 1-1 at 1-2 to 1-19; Collision (1910); *reprinted in* 6 BENEDICT, Doc. No. 3-2 at 3-11 to 3-19; Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 BENEDICT, Doc. No. 5-2 at 5-11 to 5-29; Maritime Liens and Mortgages (1967), *reprinted in* 6A BENEDICT, Doc. No. 8-3 at 8-25 to 8-32; Civil Liability for Oil Pollution Damages (1969), U.N.T.S. 1409, *reprinted in* 6 BENEDICT, Doc. No. 6-3 at 6-62.103 to 6-76.3; and Limitation of Liability for Maritime Claims (1976), *reprinted in* 6 BENEDICT, Doc. No. 5-4 at 5-32.1 to 5-44.3.

6. MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

7. MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

before the United States Supreme Court[8] and the Circuit Courts of Appeal. For example, *Alyeska Pipeline Service Co. v. Vessel BAY RIDGE*, 703 F.2d 381, 383 n. (9th Cir. 1983), *cert. dismissed*, 467 U.S. 1247 (1984), the Court noted that:

> The Maritime Law Association of the United States submitted a brief *amicus curiae* in support of Alyeska. We recognize the expertise of *amicus* and appreciate their participation.

It is the policy of the MLA to file briefs as *amicus curiae* only when, as in this matter, important issues of maritime law are involved and the court's decision may substantially affect the uniformity of maritime law.

SUMMARY OF ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED:

1. To promote uniformity in the admiralty law at both a national and international level in the interpretation of marine insurance contracts;
2. To resolve conflict among the circuit courts with respect to the application of the doctrine of *uberrimae fidei* as a principle of marine insurance;
3. To discourage potential fraud and deceptive conduct.

The Maritime Law Association stands for the proposition that the maritime law should be uniform throughout the various states of the United States and insofar as

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8. Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986); Ray v. Atlantic Richfield Co., 435 U.S. 1151 (1978); *Askew v. American* Waterways Operators, Inc., 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

practical this uniformity should be carried to an international level. Our Constitution provides the bedrock for this uniformity by extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction (Article III, Section 2 of the United States Constitution). The commercial field of marine insurance is strongly influence by the commercial insurance market of Great Britain, where much of the coverage is either written or reinsured. It is neither practical nor wise to ignore the English rule of utmost good faith which has long been a part of their law, as well as being a part of the maritime law of the United States since the inception of the Country.

A direct conflict exists among the circuits between the opinions of the Fifth Circuit in this case and the following cases: *Fireman's Fund Ins. Co. v. Wilburn Boat Co.*, 300 F.2d 631, 647 n. 12 (5th Cir. 1962), *cert. denied*, 370 U.S. 925 (1962); *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F.2d 974, 981 n. 20 (5th Cir. 1969); *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984), vacated in part, adhered to in relevant part, 779 F.2d 1485 (11th Cir. 1986); *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *Puritan Ins. Co. v. Eagle S.S. Co.*, 779 F.2d 866 (2d Cir. 1985); *Btesh v. Royal Ins. Co.*, 49 F.2d 720 (2d Cir. 1931); *A/S Ivarans Rederei v. Puerto Rico Ports Authority*, 617 F.2d 903 (1st Cir. 1980).

The adoption of the rule espoused by the opinion of the Fifth Circuit in this case adds fuel to the conflagration of fraud and deception practiced upon insurance companies generally and debases the maritime rule established through the centuries. In these times of rising insurance premiums, this is not the direction in which conduct should

be guided. This encourages lying and cheating by some at the expense of the honest insured who conducts his business in a proper manner in reliance upon our courts to enforce the rules against those who do not.

I.

THE REJECTION OF THE DOCTRINE OF *UERRIMAE FIDEI* IN THE FIFTH CIRCUIT IS CONTRARY TO THE UNIFORMITY DOCTRINE

The practical need for uniformity in the law of marine insurance by vessel owners and their underwriters, as well as all facets of the maritime public, is all too apparent because the subject matter of commercial interest floats from state to state, and nation to nation, so that it may touch many jurisdictions in a short span of time. This case is national in scope as the Fifth Circuit had to determine whether it should apply Louisiana law or Texas law. The concept that some aspects of the insurance industry are best regulated on a state-by-state basis does not apply to fundamental concepts such as this regarding the duty of disclosure and the duty of fair dealing between assured and underwriter.

The need for international uniformity in maritime law has also been recognized by this Court. This is particularly true in the field of marine insurance as it is recognized that the commercial markets of England are subject to the English law and have retained to the present time a very important function regarding the insurance and reinsurance of marine risks. This Court, speaking through Justice Holmes, recognized this special relationship as follows:

> Of course, it is desirable, if there is no injustice, that the maritime law of this country and of England should agree. *The Eliza Lines,* 199 U.S. 119, 128 (1905);
>
> There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business. *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.,* 263 U.S. 487, 493 (1924)

The law of England has now been expressed in the Marine Insurance Act of 1906 (6 EDW. 7 c. 41), where the doctrine of *uberrimae fidei* has been statutorily codified. The need for national and internation uniformity support the adoption of the doctrine of *uberrimae fidei* as the American rule of marine insurance.

II.

THE CONFLICT BETWEEN THE CIRCUITS CREATED BY THIS FIFTH CIRCUIT OPINION CREATES DISHARMONY WHERE NONE NEED EXIST

The Fifth Circuit opinion is incorrect in stating that the Fifth Circuit has not previously recognized the doctrine of *uberrimae fidei* as an entrenched rule of marine insurance. It was described as being "direct and clear" in *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.,* 409 F.2d 974, 981 n. 20 (5th Cir. 1969); and "solidly entrenched" in *Fireman's Fund Ins. Co. v. Wilburn Boat Co.,* 300 F.2d 631, 647 n. 12 (5th Cir. 1962), *cert. denied,* 370 U.S. 925 (1962). In *Steelmet, Inc. v. Caribe Towing Corp., supra,* the Eleventh Circuit described it as "a clear rule of maritime law" and "the controlling federal rule even in the face of contrary state authority." The Second Circuit has adopted the rule of *uberrimae fidei* in *Knight*

v. U.S. Fire Ins., 804 F.2d 9 (2d Cir. 1986); and *Puritan Ins. Co. v. Eagle S.S. Co.*, 779 F.2d 866 (2d Cir. 1985); and *Btesh v. Royal Ins. Co.*, 49 F.2d 720 (2d Cir. 1931).

Some confusion has apparently resulted from this Court's majority opinion in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). This often-critized opinion[9] perhaps needs to be revisited for clarification of the appropriate role of state insurance regulatory schemes with respect to marine insurance. It is respectfully submitted that the state regulatory role should not be in any way promoted to the front-line position of establishing the law relating to the duty of disclosure with respect to a marine insurance policy. Determination of this substantive admiralty rule is the function of this Constitutional Admiralty Court. The principle of *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982), that matters having a direct and vital bearing on maritime law,such as the rules of navigation even for pleasure boats, are preserved to this Court under the Constitutional grant of admiralty jurisdiction, is applicable to this doctrine of *uberrimae fidei*. This is not a question of federal preemption, but a matter of basic constitutional federal jurisdiction.

Should the Court not be persuaded that the doctrine of *uberrimae fidei* is a well-settled maritime rule, the need for uniformity in admiralty practice is so great that the Court is well justified in formulating such a rule. *See, Bohemia, Inc. v. Home Ins. Co.*, 725 F.2d 506, 510 (9th Cir. 1984). The doctrine of *uberrimae fidei* and the consequences of breach of that doctrine are matters requiring uniformity.

III.

THE DOCTRINE OF UBERRIMAE FIDEI IS AN IMPORTANT DETERRENT OF POTENTIAL FRAUD AND DECEPTIVE CONDUCT AND SHOULD BE PROMOTED

The deception and fraud authorized by the Fifth Circuit opinion is that claimant lied in the application for insurance and said she paid $110,000.00 for the fishing vessel *STACY MARIE* when, in fact, she paid $30,000.00 for it. This opinion authorizes recovery of the full insured amount of $90,000.00, less $15,000.00 salvage value for the hull, plus sue and labor charges of $15,405.00. This fraud on the underwriters should not be permitted to stand as the law of the admiralty. Rules of honest conduct should be encouraged rather than debased. If this Court is of the view that a rule requiring cancellation of the policy in these circumstances should not be declared to be the general maritime law, this Court should review the matter and adopt the rule it deems appropriate, rather than permit or encourage the search for a preferable rule of state law as undertaken by the Fifth Circuit in this case.

In *Btesh v .Royal Ins. Co., supra,* the court applied the rule of *uberrimae fidei* where the assured misdescribed

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9. Gilmore & Black, *the Law of Admiralty*, 49, 69, 70 (2d Ed. 1975). ("A nightmarish solution." "The implication of *Wilburn* would appear to be that maritime insurance law as a whole is to be excised from the general maritime law inferentially adopted by the Constitution."); Staring, *A Proposal to Reduce Confusion in the Law of Marine Insurance,* 5 Maritime Lawyer 21, 24, 25, 26 ("aggravated confusion"); *Lexington Ins. Co. v. Cooke's Seafood,* 686 F. Supp. 323, 328 (S.D. Ga. 1987); *Travelers Indemnity Co. v. Boles,* 503 F. Supp. 179, 182 n.8 (N.D. La. 1980); *Litwinowicz v. Weyerhaeuser Steamship Co.,* 179 F. Supp. 813, 820 (E.D. Pa. 1958).

cargo as cotton goods instead of silk goods to filch a little from the carrier. It was held that intent to cheat the underwriter was not required.

In *Knight v. U.S. Fire Ins. Co., supra,* the court voided a cargo insurance policy taken out in the amount of $30,000,000.00 on 222 antique stone and bronze statutes purchased in Thailand for $65,000.00 on the ground that the insured failed to disclose that a previous underwriter had cancelled a previous policy because of overvaluation and fraud. The rule of *uberrimae fidei* should be reinvigorated as a vital part of marine insurance law.

CONCLUSION

The Maritime Law Association of the United States joins Petitioner and *Amicus Curiae* in support thereof in urging this Honorable Court to accept this case and grant the Petition for Writ of Certiorari.

Dated, July 29, 1991.

Respectfully submitted,

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CERTIFICATE OF SERVICE

To the Honorable Judges of This Court:

I, Ben L. Reynolds, one of the attorneys for The Maritime Law Association of the United States and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of July, 1991, I served all parties in this matter with three copies of the Brief of The Maritime Law Association of the United States, *Amicus Curiae,* in Support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, by depositing the documents in a United States mailbox, with first-class postage prepaid, addressed to counsel-of-record at the proper postal address as follows:

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